

ATTACHMENT A

Memo to Agencies on Lost Valley Ranch Construction Prior to Obtaining Construction Stormwater or CAFO NPDES Permits

Summary

Lost Valley Ranch began construction prior to obtaining a construction stormwater permit or CAFO NPDES permit. The following memo provides factual and legal background to support the Oregon Department of Environmental Quality (DEQ) and the Oregon Department of Agriculture (ODA) investigating whether Lost Valley Ranch violated state water quality laws. We understand that ODA has already uncovered unlawful construction at the facility and notified Lost Valley Ranch. That issue is not discussed in this memo.

First, new information indicates that construction activities at Lost Valley Ranch may discharge stormwater to a surface water. DEQ's construction stormwater permit does not exempt CAFO's from the requirement to obtain a construction stormwater permit if construction activities may discharge to surface waters.

Second, Lost Valley Ranch may have violated ORS 468B.050(1)(d) by constructing the CAFO without an NPDES permit for discharges of wastes to waters of the state, including groundwater. Specifically, ORS 468B.050(1)(d) prohibits a person from "[c]onstruct[ing] . . . [a] confined animal feeding operation . . . the operation or conduct of which would cause an increase in the discharge of wastes into the waters of the state or which would otherwise alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized."

The following memo supports the agencies investigating whether: (1) Lost Valley Ranch violated state law by failing to obtain a construction stormwater permit, and (2) Lost Valley Ranch's past and ongoing construction activities violated ORS 468B.050(1)(d).

Factual Background

- Lost Valley Ranch proposes building and operating the second largest dairy CAFO in Oregon. The project is located within the Lower Umatilla Basin Groundwater Management Area.¹
- DEQ and ODA determined that Lost Valley Ranch requires a CAFO NPDES permit. To date, the agencies have held two public comment periods, received approximately 4200 comments, and not issued the permit.
- Lost Valley Ranch commenced construction sometime in spring or summer 2016. The Google Earth photo below shows construction underway on August 14, 2016.

Photo 1. Google Earth image of Lost Valley Ranch under construction (Aug. 14, 2016).



- DEQ's draft CAFO NPDES permit describes the Columbia Improvement District Canal (hereafter "irrigation canal") as the "[n]earest surface stream which would receive waste if it [*i.e.*, the CAFO, including surrounding fields] were to discharge." Draft Lost Valley Ranch NPDES Permit at 1. A pond appears near the CAFO entrance, adjacent to the construction site, in August 14, and November 29, 2016, aerial photos. See Photos 1 – 3.

¹ Lost Valley Ranch to locate on former tree farm, East Oregonian (July 28, 2016), <http://www.capitalpress.com/Dairy/20160728/lost-valley-ranch-to-locate-on-former-tree-farm>.

Photo 2. Photo of Lost Valley Ranch under construction (Nov. 29, 2016).



Photo 3. Close-up of ponded area, Lost Valley Ranch under construction (Nov. 29, 2016).



Legal Background

- ORS 468B.050(1) specifies when it is necessary to obtain a permit, stating:

(1) Except as provided in ORS 468B.053 or 468B.215, without holding a permit from the Director of the Department of Environmental Quality or the State Department of Agriculture, which permit shall specify applicable effluent limitations, a person may not:

(a) Discharge any wastes into the waters of the state from any industrial or commercial establishment or activity or any disposal system.

(b) Construct, install, modify or operate any disposal system or part thereof or any extension or addition thereto.

(c) Increase in volume or strength any wastes in excess of the permissive discharges specified under an existing permit.

(d) **Construct**, install, operate or conduct any industrial, commercial, **confined animal feeding operation** or other establishment or activity or any extension or modification thereof or addition thereto, the operation **or conduct of which would cause an increase in the discharge of wastes into the waters of the state or which would otherwise alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized.**

(e) Construct or use any new outlet for the discharge of any wastes into the waters of the state.

(emphasis added); *see also* OAR 340-045-0015(1) (implementing ORS 468B.050(1)(a)).

- ORS 468B.005(10) states: “ ‘Water’ or ‘the waters of the state’ include lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction.”
- ORS 468B.005(9) defines “wastes” as “sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive or other substances which will or may cause pollution or tend to cause pollution of any waters of the state.

- OAR 340-045-0015(2) states: “Without first obtaining an **NPDES permit**, a person may not discharge into **navigable waters** pollutants from a point source or storm water subject to permit requirements in 40 CFR § 122.26 or § 122.33, including storm water . . . associated with industrial or construction activity.” (emphasis added).
- Agricultural stormwater runoff is exempted from the definition of a “point source.” However, the exemption does not extend to building construction. *See* 40 CFR 122.3(e); *see also* Oregon DEQ, *Construction Stormwater Application and Forms Manual, 1200-C General Permit* at 3 (Dec. 2015) (hereafter *1200-C Manual*) (describing agricultural stormwater exemption and stating “This exemption does not extend to the construction of buildings. Construction of any building, areas around the building, and access roads to those buildings that disturbs 1 acre or more of agricultural or agriculture-related operations must obtain coverage under a construction permit for stormwater discharges.”).
- OAR 340-045-0010(3) defines “navigable waters” as “all navigable waters of the United States and their tributaries; interstate waters; and intrastate lakes, rivers, and streams that are used by interstate travelers for recreation or other purposes or from which fish or shellfish are taken and sold in interstate commerce or that are used for industrial purposes by industries in interstate commerce.” In contrast, OAR 340-045-0010(20) defines “public waters” and “waters of the state” to include water resources beyond navigable waters. *See* OAR 340-045-0010(20) (defining “public waters” and “waters of the state” as “lakes, bays, ponds, impounding reservoirs, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon, and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters that do not combine or effect a junction with natural surface or underground waters) that are wholly or partially within or bordering the state within its jurisdiction.”).
- DEQ’s *1200-C Manual* ignores the distinction between “navigable waters” and “public waters” or “waters of the state.” The *1200-C Manual* ‘Question & Answer’ section describes activities that trigger the 1200-C permit requirement. The *1200-C Manual* states:

Is there any possibility that stormwater could run off your site during construction and into **surface waters or conveyance systems leading to surface waters of the state**? In many cases, the answer to this question is yes. However, if the topography and location (such as an area where the conveyance system discharges to drywells) of your site is such that there is no possibility that rainfall or snowmelt could leave the site or enter a waterway, you do not need permit coverage.

1200-C Manual at 3 – 4 (emphasis added). Oregon’s water pollution statutes and implementing regulations do not define the term “surface waters” or “surface waters of the state.” Overall, DEQ appears to use a hybrid between “navigable waters” (i.e., “waters of the U.S.”) as used in OAR 340-045-0015(2) and the broad “waters of the state” term as used in OAR 340-045-0015(1).

Request for Investigation

- The coalition requests that the agencies investigate whether Lost Valley Ranch violated state law by failing to obtain a permit for construction stormwater discharges prior to commencing construction. Based on aerial photos from August and November showing a pond adjacent to the construction site, the agencies have grounds to act now and order the facility to cease construction activities if the agencies conclude a permit was required.
- The coalition requests that the agencies investigate whether Lost Valley Ranch violated ORS 468B.050(1)(d). First, construction activities may discharge wastes to groundwater and the pond. Specifically, aerial photos show a multiple large construction vehicles stored on site with potential to release oil. Second, the large area of earthmoving activities meet the criteria of “conduct . . . [that] would otherwise alter the physical, chemical or biological properties of any waters of the state” (i.e., groundwater). Comments submitted by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) note that land clearing activities are likely impacting groundwater quality. Similarly, the large area of exposed soils creates potential for fugitive dust releases to the ponded area. The agencies are not confined to the CWA ‘point source’ and ‘discharge’ limits under the broader language of ORS 468B.050(1)(d).